

decided February 4, 1999

- *In Re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1,5 (EAB 2000)
- *Friends of the Earth, Netherlands & Alfred Akpan et al v Royal Dutch Shell Petroleum* (2012)
- *Kiobel v Royal Dutch Shell Petroleum* (2009)

Statutes:

- Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237
- 40 C.F.R.. § 124.19
- 5 USCS § 702

Regulations:

Environmental Justice Guidelines

Executive Orders:

Executive Order # 12898

Executive Order # 13563

INTRODUCTION

Ed W. Coleman, Co-coordinator of Citizens For Clean Air (“CCA”), appeals a decision by Omer Shalev, the EPA Region 9 (“Region”) authorized Presiding Administrative Officer.

Appellant seeks standing under the PSD permitting process in the hope of obtaining Region review of Best Available Control Technology (“BACT”) before construction begins on this facility. Appellant seeks relief under the Administrative Procedures Act (“APA”) and Environmental Justice Guidelines. CCA has met pleading requirements such as timeliness, standing, and issue preservation. *See* 40 C.F.R.. § 124.19; *In Re*

Knauf Fiber Glass, GmbH, 9 E.A.D. 1,5 (EAB 2000).

On October 1, 2012, Omer Shalev issued a final decision which denied all public hearings regarding a Sierra Pacific Industries cogeneration/sawmill facility planned for Shasta County. The Presiding Officer Omer Shalev violated Environmental Justice Guidelines by establishing a threshold for public involvement and then refusing to disclose that threshold to the public.

On October 15, 2012, Ed C. Coleman, on behalf of CCA, filed an appeal of the Region's decision denying their request for a public hearing.

CCA purposefully filed an appeal to the Region's final decision to deny CCA's public hearing request within the 30 day statutory deadline, as required under the APA. CCA wished to ensure that it timely appealed that decision so it could be reviewed now

On February 20, 2013, Presiding Administrative Officer Omer Shalev issued Sierra Pacific Industries a Prevention of Significant Deterioration (PSD) permit modification for their proposed Anderson, CA facility.

For the reasons stated below, the Presiding Officer Omer Shalev erred when he concluded that the citizens of Shasta County should be penalized for misunderstanding the "non-disclosed threshold" required by Omer Shalev to obtain a public hearing.

It is arbitrary and capricious to create a standard that can not be met.

ISSUES PRESENTED FOR REVIEW

Appellant alleges error in the following :

A. Appellant alleges Presiding Officer Omer Shalev erred in stating that the Region "had discretion to hold a Public Hearing if we determine there is a significant amount of public interest," but at the same time not providing *any* details on what the threshold for the public to obtain a hearing might be.

B. Appellant alleges Presiding Officer Omer Shalev erred in his determination that no significant amount of public interest existed.

C. Appellant alleges that since Shasta County is an Environmental Justice community, the standard for review under Environmental Justice Guidelines in such communities is exceptionally low. Region 9 is the lead as well as advisory agency for Executive orders #12898 and #13563. It is reasonable to expect higher standards from the Region.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2012, Omer Shalev issued a final decision which denied all public hearings regarding a Sierra Pacific Industries cogeneration plant planned for Shasta County.

In this October 1, 2012 email, Omer Shalev stated to CCA, "... EPA does not currently plan to hold a public hearing for this proposed action. As stated in the public notice for this proposed action, 'pursuant to 40 CFR 124.12, EPA has discretion to hold a Public Hearing if we determine there is a significant amount of public interest in the proposed permit. Requests for a Public Hearing must state the nature of the issues proposed to be raised in the hearing.' To date, EPA has not received a significant amount of public interest in this project or additional requests for a public hearing. Moreover, your request for a public hearing has not stated 'the nature of the issues proposed to be raised in the hearing.' If you still desire for EPA to hold a public hearing, you must state the issues that you intend to propose at the hearing, and we must receive indications that there is a significant amount of public interest."

Under the APA, Appellants had 30 days from the final decision issued by the Presiding Officer in which to appeal that decision. Since our injury occurs under APA and Environmental Justice Guidelines, we risked losing standing if we failed to exhaust our administrative remedies by not filing before the October 30, 2012 deadline.

On February 20, 2013, Presiding Administrative Officer Omer Shalev issued Sierra Pacific Industries a Prevention of Significant Deterioration (PSD) permit modification for their proposed Anderson, CA facility.

Despite CCA having filed an appeal with the Board on October 15, 2013 (requesting a public hearing) and despite receiving numerous letters from the public (as evidenced by the available public comments documents), Presiding Administrative Officer Omer Shalev refused to grant the citizens of Shasta County a public hearing.

ARGUMENT

The Presiding Officer erred in his decisions:

- A. Presiding Officer Omer Shalev erred in stating that a threshold of "significant public interest" existed that would allow the Region to hold a public hearing, while simultaneously failing to provide significant details to the public on how to obtain a hearing.

The APA requires that in order to set aside agency action not subject to formal trial-like procedures, the court must conclude that the regulation is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." The Presiding Officer

violated Environmental Justice Guidelines by establishing a threshold for public involvement and then refusing to disclose that threshold to the public. It is arbitrary and capricious to conclude that the citizens of Shasta County should be penalized for not meeting the threshold. If the Region sincerely desired public participation, they would have given an accurate and detailed explanation of the threshold requirements. Anything less is an abuse of discretion.

According to the Attorney General's Manual on the Administrative Procedure Act (1947), drafted after the 1946 enactment of the APA, the basic purposes of the APA are (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rule making process; (3) to establish uniform standards for the conduct of formal rule making and adjudication; (4) to define the scope of judicial review.

Here, by denying a public hearing, Presiding Officer Omer Shalev failed to keep the public informed. He failed to provide public participation in the rule making process. He failed to establish uniform standards for the conduct of formal rule making and adjudication. He failed to define the scope of judicial review.

His failures have created a significant *injury in fact* to the health, civil rights and general welfare of the people who live in Shasta County.

This case presents an excellent opportunity for the Board to define the scope of judicial review, as well as require the Region to keep the public informed of their organization, procedures and rules.

Pursuant to 5 USCS § 702, a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, may seek redress of grievances. While the standing requirements imposed by Article III require a plaintiff to suffer a sufficient injury in fact, § 10 of the Administrative Procedure Act, requires that the plaintiff also demonstrate that he or she has prudential standing. For a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated.

The citizens of Shasta County have suffered an “injury in fact,” since we have been denied a public hearing under Environmental Justice Guidelines. We are within the “zone of interests” as demonstrated by the rule that Environmental Justice calls for “early and sustained” involvement of the community. Our repeated requests for a single hearing were denied.

B. Presiding Officer Omer Shalev erred in his determination that no significant amount of public interest existed.

Shasta County has already been identified as an Environmental Justice community. See *In Re KNAUF FIBER GLASS, GMBH PSD Appeal Nos. 983 through 9820*, “ORDER DENYING REVIEW IN PART AND REMANDING IN PART,” decided February 4, 1999.

The following guidelines under Executive Order # 12898 have been violated by the Region:

- 1) Region did not "go above and beyond usual protocol to identify, involve and help potentially affected communities."
- 2) Region did not "provide opportunities for community input in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving accessibility of public meetings, official documents and notices to affected communities."
- 3) Region did not follow the procedures found on page 5 of Executive Order # 12898 which reads: "Community involvement is particularly important in cases involving potential environmental justice issues. Early and sustained communications with the affected community throughout the NEPA process is an essential component of environmental justice."
- 4) Region did not follow the procedures found on page 17 of Executive Order # 12898 which reads: "Local resources should be sought for local and up-to-date knowledge of a given area and its inhabitants as well as a lead to other sources of information...Outreach to community groups may be the most reliable data collection method in other cases..."

Environmental Justice calls for early and sustained involvement of the community. Our repeated requests for a single hearing have been denied.

C. Presiding Officer Omer Shalev erred when he failed to recognize Region is the lead as well as advisory agency for Executive Orders # 12898 and #13563.

Standards under Environmental Justice Guidelines are exceptionally low. Region is the lead as well as advisory agency for Executive orders # 12898 and #13563. It is reasonable to hold the Region to higher standards than this. Otherwise the Region appears corrupt and incompetent. The public will lose faith in the Region if they are allowed such arbitrary and capricious decisions.

On February 11, 1994, President Bill Clinton issued Executive Order # 12898, which encourages to “the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States...”

On January 18, 2011, President Obama issued Executive Order # 13563, which emphasizes the importance of protecting “public health, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation.”

CCA advocates on behalf of job creation. It is unfair to force law abiding factories to compete against gross polluter that break the rules. A cost benefit is realized when companies have to comply with community standards. Public health is protected in this way.

Executive Order # 13563 points to the need for predictability and for certainty, and for use of the least burdensome tools for achieving regulatory ends. It indicates that agencies “must take into account benefits and costs, both quantitative and qualitative.” It reaffirms the principles, structures, and definitions in Executive Order # 12866, which has long governed regulatory review. It also authorizes agencies to consider, and discuss qualitatively, “values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”

Where is the equity, human dignity and fairness in denying public hearings for an environmental justice community?

Executive Order # 13563 elaborates new principles to guide regulatory decision making. First, agencies are directed to promote public participation, in part through making relevant documents available on the [regulations.gov](http://www.regulations.gov) to promote transparency and comment.

CCA is still waiting on an important Freedom of Information Request. This FOIA request is for the complete comments document, which remains unavailable to the citizens of Shasta County.

Executive Order # 13563 also directs agencies to engage the public, including affected stakeholders, before rule making is initiated.

The opposite has occurred in this case.

Region should be working to promote public participation, not deny it based upon arbitrary and capricious standards.

CONCLUSION

CCA asks that the Board direct Region to provide a well-reasoned explanation of why it

declined the citizen request for a public hearing in light of the statute and regulations and how it took the environmental justice Executive Order into account. *See* CCA § 165(a)(2), 42 U.S.C. § 7475(a)(2).

Please grant Appellant a remand of Region's decision to deny involvement.

People deserve a public hearing. This is an important issue which could result in significant policy change. Environmental Justice Guidelines require meaningful involvement by the very communities the Region seeks to serve.

Respectfully submitted,
Ed W. Coleman
P.O. Box 1544
Shasta Lake City, CA 96019
(530) 275-4626
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